90-1066

No. _____

In The

Supreme Court of the United States

October Term, 1990

SEQUOIA BOOKS, INC.,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a criminal contempt action, the transparent constitutional invalidity of an injunctive order against a bookstore operation, establishes a First Amendment exception to the collateral bar rule of *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Sequoia Books, Inc., prays that a writ of certiorari issue to review the Order of the Appellate Court of the State of Illinois, Second District, entered on March 30, 1990.

OPINION BELOW

The unpublished order of the Appellate Court of the State of Illinois for the Second District, General No.

2-87-1008 (March 30, 1990), is included in the Appendix as Exhibit A.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3) since this cause involves an alleged violation of rights arising under the Constitution of the United States.

An unpublished Order was issued by the Appellate Court on March 30, 1990. Petitioner sought rehearing from the Second District Appellate Court, which was denied on May 22, 1990. A copy of the Order denying rehearing is included in the Appendix as Exhibit B. The Petitioner sought timely leave to appeal to the Illinois Supreme Court, and on October 3, 1990, review was denied. A copy of the Order is included in the Appendix as Exhibit C. The Petitioner filed an affidavit of intent to seek review in the United States Supreme Court and a Motion to Stay the Mandate with the Illinois Supreme Court. On October 29, 1990, the Motion to Stay was granted, and a copy of the Illinois Supreme Court's Order staying the mandate is included in the Appendix as Exhibit D.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the Constitution of the United States and the Illinois Criminal Public Nuisance Act, Chapter 38,

Section 37-1, et seq., Ill.Rev.Stat. (1987), are set forth in the Appendix Exhibit E and F.

STATEMENT OF THE CASE

On January 1, 1986, new legislation amending the Illinois Criminal Public Nuisance Act, Chapter 38, Section 37-1, Ill.Rev.Stat. (1987) became effective. Prior to the amendment, the statute declared as public nuisance the operation of a gambling house, a brothel, or other like activity, all involving violations and provisions of the Illinois Criminal Code. The amendment added a new category of predicate offenses for which abatement orders in the form of injunction and closure orders could be entered by Circuit Courts in Illinois. In pertinent part, the statute provides: "Maintaining Public Nuisance. Any building used in the commission of offenses prohibited by Sections . . . 11-20 . . . of the 'Criminal Code of 1961' . . . is a public nuisance." Section 37-4 authorizes jurisdiction in Illinois Circuit Courts for an abatement action which can be commenced by the State's Attorney of the County in which alleged nuisance is located. The circuit court is granted jurisdiction to issue ex parte orders of injunction without notice or bond. After hearing, the court may issue a further order of a permanent nature, restraining use of the building for one year, including the requirement of posting a bond of up to $5,000 to stay the effect of such an abatement order. As a condition of the bond, no offense specified under the act may be committed on the property.

On January 7, 1986, the State's Attorney of Kendall County filed a complaint seeking a preliminary injunction, a permanent injunction, and other sanctions against the petitioner, Sequoia Books, Inc. The complaint alleged *inter alia* that the bookstore was being operated in violation of Chapter 38, Section 37-1 *et seq.*, that Petitioner had been convicted of obscenity on prior occasions, and had sold or exhibited obscene materials on its business premises. Subject matter jurisdiction was predicated solely upon the Illinois Criminal Public Nuisance Act, Chapter 38, Section 37-1, *et seq.*, Ill.Rev.Stat. (1985).

At the initial hearing on the complaint, the trial court denied Sequoia's motion to dismiss and rejected Sequoia's argument that the Illinois Public Nuisance Act imposed an invalid prior restraint on future speech and lacked the procedural safeguards necessary to prevent a system of prior restraint.

On January 21, 1987, Circuit Judge Wilson Burnell fined Petitioner $500 and entered a permanent injunction against Sequoia Books which provided:

> "[T]his Court hereby enjoins the Defendant, Sequoia Books, Inc., . . . from maintaining the public nuisance . . . and further expressly enjoins the Defendant, Sequoia Books, Inc., . . . from exhibiting, selling or offering for sale material in the premises . . . in violation of Chapter 38, Section 11-20, Ill.Rev.Stat."

Judge Burnell further stayed enforcement of the injunction pending appeal and upon Sequoia Books posting a $5,000 cash bond. Sequoia Books filed its notice of appeal, posted the bond and continued operation.

At all stages of the trial court proceedings, pre-trial motions, in trial motions and arguments and in post-trial motions, petitioner maintained that the Illinois Criminal Public Nuisance Act was unconstitutional. Petitioner contended the Act was infirm, in violation of the First and Fourteenth Amendments to the Constitution of the United States, as an invalid prior restraint, and for failing to meet the constitutional requirements of *Freedman v. Maryland*, 380 U.S. 51 (1965) and recent decisions of the United States Supreme Court.

While the appeal from the permanent injunction was pending, the State of Illinois requested that Petitioner's bond be revoked because Sequoia Books had sold sexually explicit materials alleged to be obscene. On May 4, 1987, the trial court found that Sequoia had violated the bond by selling obscene materials at the premises on March 4 and 5, 1987. Over Petitioner's objections, the State's request was granted, the bond revoked, and the injunction placed in full force and effect on May 11, 1987.

Petitioner sought a stay of the injunction order from the Second District Appellate Court, the Illinois Supreme Court and eventually from this Court. In the stay requests, Petitioner again asserted the unconstitutionality of the statute, but no stay of the injunction was granted.

In a subsequent trial proceeding, a petition for rule to show cause was issued against Sequoia Books by the Kendall County State's Attorney's office on May 26, 1987. The petition alleged that Sequoia Books had violated the permanent injunction order of January 21, 1987 by offering for sale two magazines, "Leather Sleaze" and "Hard Leather" in its bookstore on May 11, 1987. It was alleged

that these magazines were obscene and that therefore, the permanent injunction had been violated. On June 15 and 16, 1987, following a jury trial, petitioner was found to have violated the permanent injunction entered January 21, 1987 and was adjudged in criminal contempt and fined $10,000.

Petitioner's timely filed post-trial motion was denied. In that motion and at every stage of the contempt proceedings, Petitioner maintained that the Illinois Criminal Public Nuisance Act was violative of the First and Fourteenth Amendments and further, that the permanent injunction issued against it was likewise unconstitutional. Petitioner timely appealed to the Second District Appellate Court.

On January 19, 1988, the Illinois Appellate Court, Second District, issued its opinion in the appeal from the permanent injunction order entered on January 21, 1987. In *People v. Sequoia Books, Inc.*, 165 Ill.App.3d 143, 518 N.E.2d 775 (2nd Dist. 1988), (hereinafter referred to as *"Sequoia Books I"*), the Court ruled that the Illinois Criminal Public Nuisance Act as amended, was unconstitutional and in violation of the First and Fourteenth Amendments to the Constitution of the United States, as an invalid prior restraint. The Illinois Appellate Court reversed the permanent injunction, and the $500 fine was vacated. The State's petition for rehearing was eventually denied at which time, the State petitioned for leave to appeal to the Illinois Supreme Court.

While these appeals were pending, another petition for rule to show cause was filed and directed against Sequoia Books on July 17, 1987. Following a jury trial

held on September 23 and 24, 1987, Petitioner was again found in contempt of court for being in violation of the permanent injunction and a $20,000 fine was imposed. In addition, the trial court entered a closure order and the bookstore was padlocked. Sequoia Books sought emergency relief from the Second District Appellate Court which was denied on November 3, 1987. Sequoia Books then sought emergency relief from the Illinois Supreme Court, and this Court. And all requests in the form of the stay of the closure order were denied, and all requests again asserted the unconstitutionality of the statute. Petitioner timely appealed to the Second District Appellate Court.

On July 21, 1988, the Second District Appellate Court issued its opinion in *People v. Sequoia Books, Inc.*, 172 Ill.App.3d 627, 527 N.E.2d 50 (2nd Dist. 1988) (hereinafter referred to as *"Sequoia Books II"*) upholding the trial court's imposition of the $10,000 fine and contempt citation. The court rejected the petitioner's contention that because the statute was held unconstitutional in *Sequoia Books I*, the permanent injunction was transparently invalid because it was directed against speech. The court instead, applied the collateral bar rule of *Walker v. City of Birmingham*, 388 U.S. 307 (1967). Under that rule, a court order must be obeyed in the face of a contempt citation, absent transparent invalidity of the order or lack of subject matter jurisdiction in the contempt action. In *Sequoia Books II*, the Appellate Court specifically rejected the argued contrary authority of *Matter of Providence Journal Company*, 820 F.2d 1342 (1st Cir. 1986) (mod. 820 F.2d 1354 (1st Cir. *en banc* 1987) *cert. dismissed*, 485 U.S. 693, 108 S.Ct. 1502 (1988)). The Appellate Court reasoned that

because the subject of the restraint was obscenity, the order was not transparently invalid and therefore, sanctions for being found in violation was appropriate and the collateral bar rule should apply. The Appellate Court went on to distinguish the decision in *Sequoia Books I* from the trial court's decision in *Sequoia Books II* and reasoned:

> "We note that we do not perceive conflict between this decision and the Court's earlier decision reversing the injunction. The earlier decision finding Section 37-1, *et seq.*, of the Code unconstitutional and reversing the injunction was focusing on paragraph 2 of the injunction as is evidenced by the Court's reference to the Order's one year period; the one year period being mentioned only in paragraph 2 of the injunction. Paragraph 2 enjoins the use of the building for one year. Hence, if Defendant had not posted bond, it would have been in violation of the injunction, even for the sale of non-obscene material. Consequently, paragraph 2 was a prior restraint on free speech.
>
> Finally, we address the way in which we have severed the two portions of the injunction for purposes of the above-analysis. The respect with which court orders must be accorded, requires that the exception found in *Cooper v. Oxford Newspaper, Inc.*, 50 Ill.App.3d 250, 365 N.E.2d 746 (1977) and *In Re Providence Journal Company*, 820 F.2d 1342 (1st Cir. 1986) (mod. 820 F.2d 1354 (1st Cir. *en banc* 1987) be very narrowly applied such that if a portion of an injunction is constitutionally valid and it is that portion which is violated, a contempt finding should stand. We are, therefore, of the opinion that a distinction that we draw between the two paragraphs is proper. *People v. Sequoia Books*, 172 Ill.App.3d 627, 527 N.E.2d 50, 57 (2nd Dist. 1988) (*Sequoia Books II*).

Sequoia Books' timely filed petition for rehearing was denied by the Court on August 29, 1988. Petitioner sought review in the Illinois Supreme Court, which, on December 8, 1988, denied the petition for leave to appeal. On January 3, 1989, the Illinois Supreme Court stayed the mandate pending this Court's action on the petition for certiorari. On June 5, 1989, this Court denied Sequoia's petition for certiorari which presented the same issues asserted in this petition. *People v. Sequoia Books, Inc.*, ___ U.S. ___, 109 S.Ct. 2447 (1989).

On March 22, 1989, the Illinois Supreme Court issued its opinion in the State's appeal from *Sequoia Books I*. In *People v. Sequoia Books, Inc.*, 127 Ill.2d 271, 537 N.E.2d 302 (1989), (hereinafter referred to as "*Sequoia Books III*"), the court ruled that one year closure and bond provisions of the Illinois Criminal Public Nuisance Act, as amended, were unconstitutional as applied to properties which had been adjudicated to be nuisances solely on account of their use in the commission of the offense of obscenity.

In *Sequoia Books III*, the Illinois Supreme Court determined that the Illinois Criminal Public Nuisance Act "regulated future conduct that remains fully clothed within First Amendment guarantees" and was found to be inconsistent with the traditional requirement that the regulation of any form of expression, even obscenity be narrowly tailored to prevent an undue impact upon protected speech. The State sought review with this Court, and was denied on January 16, 1990. *People v. Sequoia Books, Inc.*, ___ U.S. ___, 110 S.Ct. 835 (1990).

On March 30, 1990, the Illinois Appellate Court, Second District, issued its opinion in Sequoia's Appeal from

the September 28, 1987, $20,000 fine. In *People v. Sequoia Books, Inc.*, General No. 2-87-1008 (2nd Dist., March 30, 1990) (hereinafter referred to as *"Sequoia Books IV"*) the Appellate Court rejected the argument that the fact that the Illinois Criminal Public Nuisance Act was unconstitutional demonstrated the transparent invalidity of the permanent injunctive order, and reaffirmed its position in *Sequoia Books II* which reasoned that because the subject of the restraint was obscenity, the Order was not transparently invalid, and therefore, sanctions were appropriate, and the collateral bar rule should apply. The Appellate Court in its unpublished order stated:

> "[I]nasmuch as the instant contempt judgment was premised on the same underlying injunction which was reversed in *Sequoia I* and our decision in *Sequoia I* has been affirmed as modified by the Illinois Supreme Court in *Sequoia III*, 127 Ill.2d 271, we conclude our decision in *Sequoia II*, 172 Ill.App.3d 627 is depositive of the present appeal. Accordingly, the judgment of the Circuit Court of Kendall County is affirmed. *People v. Sequoia Books, Inc.*, No. 2-87-1008, slip op. at 5, 2nd Dist. Mar. 30, 1990) (*Sequoia Books IV*).

Sequoia Books' timely filed petition for rehearing was denied by the Court on May 27, 1990. Petitioner sought review in the Illinois Supreme Court, which, on October 3, 1990, denied the Petition for Leave to Appeal. *People v. Sequoia Books, Inc.*, 133 Ill.2d 568, 561 N.E.2d 703 (1990). Petitioner filed a motion to stay the mandate with the Illinois Supreme Court on October 17, 1990. On October 29, 1990, the Illinois Supreme Court stayed the mandate in this cause pending this Court's action on the petition for certiorari.

In order to better understand this sequence and interrelationship of all the relevant proceedings, a sequential time outline is set forth in the Appendix as Exhibit G.

REASONS FOR GRANTING THE WRIT

The Illinois Appellate Court's opinion in *Sequoia Books II* and *Sequoia IV*, applying the "collateral bar rule" in this First Amendment setting, conflicts with the decisions of this Court and the First Circuit.

This petition arises from the Illinois Appellate Court, Second District's unpublished order which effectively "rubber stamped" the prior published opinion issued in *People v. Sequoia Books, Inc.*, 172 Ill.App.3d 627, 527 N.Ed.2d 50 (1988) (*Sequoia Books II, cert denied,* ___ U.S. ___, 109 S.Ct. 2447 (1989)), adopting that Court's reasoning in toto. There is an endless conflict between First Amendment principles against prior restraint and the collateral bar rule. The same issue which forms the basis in this petition, was presented for review to this Court as a result of the decision rendered in *People v. Sequoia Books, Inc.*, 172 Ill.App.3d 627, 527 N.Ed.2d 50 (1988) (*Sequoia Books II*), cert. denied, ___ U.S. ___, 109 S.Ct. 2447 (1989)).

The Petitioner, Sequoia Books, Inc., has been found in criminal contempt and fined $20,000 for violating an order which prohibited it from selling or exhibiting sexually explicit materials in violation of the Illinois Obscenity Statute, Chapter 38, Section 11-20, Ill.Rev.Stat. (1987). The trial court's authority for issuing the court order eminated from the Illinois Criminal Public Nuisance Act, Chapter 38, Section 37.1, *et seq.*, Ill.Rev.Stat. 1987).

As a general rule, court orders, even those determined unconstitutional are to be obeyed. It is the duty of the citizen, who is the subject of the court order, to seek a stay of its effect and appellate review of its substance and to comply with the order, in the absence of special circumstances, pending that further review. This is the

essence of the collateral bar rule as announced by this Court. *Walker v. City of Birmingham*, 388 U.S. 307 (1967). The "special circumstances" that form the general exception to the *Walker* rule are, in reality, two-fold. If the court lacked subject matter jurisdiction, then the invalidity of the order predicated upon the lack of jurisdiction, would be a defense in any subsequent contempt action. Alternatively, if the injunction order is "transparently invalid", a successful attack upon the validity of the order would prevent imposition of sanctions for violation of that invalid order. See *Walker*, 388 U.S. at 315.

Whether or not the Petitioner has been punished for the alleged violation of an invalid court order is thus the central issue in the contempt action. *Donovan v. City of Dallas*, 377 U.S. 408, 414 (1964). If the sole basis for the State Court's jurisdiction is an unconstitutional statute, the unconstitutionality of that statute should operate as a bar to contempt actions for an unconstitutional statute is not a law and as such, the invalid statute confers no rights and imposes no duties or responsibilities by its terms. *Norton v. County of Shelby*, 118 U.S. 425, 442 (1886).

A State court order may be described as "transparently invalid" if an argument to sustain it would be totally lacking in merit or as otherwise patently frivolous. In *Matter of Providence Journal Company*, 820 F.2d 1342 (1st Cir. 1986) (mod. 820 F.2d 1354 (1st Cir. *en banc* 1987) *cert. dismissed* 485 U.S. 693, 108 S.Ct. 1502 (1988)), the Court of Appeals held that the "collateral bar rule" does not apply to transparently invalid court orders. There, a trial court had temporarily enjoined the publisher of a newspaper from disseminating information about a defendant in a criminal case. The newspaper did not seek appellate

review and instead, published in the face of the court order which prescribed the contrary. The Court of Appeals found that the order in question imposed an invalid prior restraint, was patently unconstitutional and transparently invalid within the meaning of *Walker v. City of Birmingham*, 388 U.S. 307 (1967). The court noted the specific distinction between pure speech and speech involving conduct and stated:

> [T]here are instances where an order will be so patently unconstitutional that it will be exempt from the collateral bar rule . . . any prior restraint on expression comes to this court with a 'heavy' presumption against its constitutional validity.
>
> Where, as here, the prior restraint impinges upon . . . and involves expression in the form of pure speech – speech not connected with any conduct – the presumption of unconstitutionality is virtually insurmountable. *Matter of Providence Journal Company*, 820 F.2d at 1328 (footnote omitted).

The First Circuit's conclusion that the order in question there was transparently invalid placed solid reliance on the decisions of this court in *Near v. Minnesota*, 283 U.S. 697 (1931), *New York Times, Co. v. United States*, 403 U.S. 713 (1971) and *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976). This court has never upheld a prior restraint on pure speech; that is, "speech not connected with any conduct." *Matter of Providence Journal Company*, 820 F.2d at 1348-1349. Here, the court's in *Sequoia I* and *Sequoia III* determined that the Illinois Public Nuisance Act was unconstitutional as a prior restraint on pure speech. These decisions went beyond finding the Act "transparently invalid" and decidedly affirmed that the Act violated Petitioner's First Amendment freedoms.

Additionally, the *en banc* opinion modifying the original opinion in *Matter of Providence Journal Company*, 820 F.2d 1342 (1st Cir. 1986) (mod. 820 F.2d 1354 (1st Cir. *en banc* 1987) *cert. dismissed* 485 U.S. 693, 108 S.Ct. 1502 (1988)), suggested that for the collateral bar rule to not apply, ordinarily, the criminal contemnor should seek a stay and appellate review of this court order. Another circuit has reached the same conclusion concerning the requirement that a contemnor must follow the established appellate procedure prior to challenging the validity of a court order.

In *United States v. Dickinson*. 465 F.2d 496 (5th Cir. 1972), the court upheld the conviction for criminal contempt against two newspaper reporters. The writers had written articles for their respective papers summarizing testimony presented in court, and in violation of a court order. The Fifth Circuit determined that the "gag" order violated the First Amendment, but held that the two reporters had refused to obey the order without testing its validity through established appellate procedures. The court commented:

> [T]he rule that unconstitutional court orders must nevertheless be obeyed until set aside it presupposes the existence of at least three conditions: (i) the court issuing the injunction must enjoy subject matter and personal jurisdiction over the controversy; (ii) adequate and effective remedies must be available for orderly review of the challenged ruling, and (iii) the order must no require an irretrievable surrender of constitutional guarantees. *Id*. 465 F.2d at 511.

Apparently, if one or more of the *Dickinson* conditions are absent, the contemnor's posture against the

unconstitutional court order is strengthened. Here, Sequoia has throughout this litigation, asserted the invalidity of the Illinois Public Nuisance Act and carried that argument through the appropriate appellate processes. Sequoia continues to argue that an invalid unconstitutional statute cannot form the basis of subject matter jurisdiction. Clearly, the third condition in *Dickinson* is distinguished in that the imposition of fines, closure orders and a system of self-censorship, sanctions Sequoia and forms the basis of an "irretrievable surrender" of its First Amendment right to free speech.

The Second District Appellate Court's ruling in *Sequoia Books II* and the subsequent decision in *Sequoia Books IV* under scrutiny here, are in conflict with this court's decisions on the issue of prior restraint, this court's decisions on jurisdictional power of a court under an unconstitutional statute, and decisions of the First and Fifth Circuit in *Matter of Providence Journal*, 820 F.2d 1342 (1st Cir. 1986) (mod. 820 F.2d 1354 (1st Cir. *en banc* 1987) *cert. dismissed* 485 U.S. 693, 108 S.Ct. 1502 (1988)) and *Dickinson* respectively, on the application of the collateral bar rule.

The Illinois Appellate Court, Second District, in *People v. Sequoia Books, Inc.*, 127 Ill.2d 271, 537 N.Ed.2d 302 (1988) (*Sequoia Books I*), determined the underlying statute, the Illinois Criminal Public Nuisance Act, was unconstitutional and held:

> [T]he one year closure and bond provisions of Section 37-4 (the Illinois Criminal Public Nuisance Act), which were applied in this case, are

> declared unconstitutional as applied to properties which have been adjudicated to be nuisances solely on account of their use in the commission of the offense of obscenity under Section 11-20. *Sequoia Books I*, 127 Ill.2d 271, 537 N.E.2d at 312.

Indeed, the court in *Sequoia Books I* clearly and unequivocably struck the Act down as unconstitutional insofar as it authorized injunctions against adult bookstores that sell sexually explicit materials. The Second District Appellate Court and the Illinois Supreme Court in reaching the decisions in *Sequoia Books I* and *Sequoia Books III*, broke no new ground and merely followed the fundamental principles set forth by this court as established in *Near v. Minnesota*, 283 U.S. 697 (1931), and its progeny.

The panel's opinion in *Sequoia Books II* and its unpublished order in the present case sought to distinguish the opinions in *Sequoia Books I* and *Sequoia Books III*, arguing that since the subject matter of the contempt order was obscenity and obscenity is not protected under the constitution, the collateral bar rule announced in *Walker v. City of Birmingham*, 388 U.S. 307 (1967) would apply. This argument lacks merit. The court's decision in *Sequoia I* and Sequoia III held that the Illinois Public Nuisance Act was unconstitutional, as it imposed a prior restraint on non-obscene material. An unconstitutional statute cannot form the basis of subject matter jurisdiction for the imposition of sanctions. Also, it is interesting to note that the panel's opinion in *Sequoia Books IV* in this regard, directly contradicted the opinions in *Sequoia Books I* and *Sequoia Books III* on this issue. The court in *Sequoia Books I* stated:

> [T]here is little question that the order which enjoins the defendants from selling or exhibiting explicit material in the Denmark II Bookstore for one year acts as a prior restraint on its First Amendment rights. *On this basis of past violations, the court enjoined defendants from future sales of sexually explicit materials, whether or not they were actually obscene. This is prior restraint in one of the purest forms. Sequoia Books I*, 165 Ill.App.3d 143 at 146, 518 N.E.2d 775 at 778. (emphasis added)

The Illinois Supreme Court recognizing the dim line between protected and unprotected speech, and by affirming the lower court's decision, solidified the position that nonobscene materials still maintain constitutional protection. That court stated:

> [T]he activity regulated in the sale and distribution of sexually explicit material, written and visual, from a single location and by a single seller. Insofar as the materials are legally obscene, it forms no part of the "speech" protected by the First Amendment. Insofar as the material is not obscene, it is speech, and remains fully clothed within the First Amendment guarantees. *Sequoia Books III*, 127 Ill.2d 271, 537 N.E.2d at 310.

The Illinois Supreme Court decision in *Sequoia Books III* follows this court's analysis in *Miller v. California*, 413 U.S. 15 (1973) and *Jenkins v. Georgia*, 418 U.S. 153 (1974). Under these decisions, it is clearly established that sexually explicit materials enjoy constitutional protection and are presumed protected until and unless a proper judicial application of the constitutional test for obscenity had occurred. Where, as here, the trial court's order enjoined in the sale or exhibition of unnamed materials in the

future, there was imposed an invalid prior restraint of pure speech. See also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

There is nothing surprising nor uniquely creative about the argument that future speech in its pure form as speech – as opposed to conduct – may not be constitutionally enjoined. The court's decision in *Near v. Minnesota*, 283 U.S. 697 (1931) is recognized as a cornerstone of the First Amendment jurisprudence. Petitioner sought refuge in the prior restraint analysis predicated on *Near* and guidelines for systems of prior restraint set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965), in its initial response to the complaint which sought preliminary and permanent injunctive relief against it. The fact that the Petitioner has steadfastly maintained that both the statute which purported to give the trial court jurisdiction and the order issued by the trial court violated its rights under the First Amendment, throughout the entire course of this litigation highlights the significant conflict between the Appellate Court decision in this case and the First Circuit decision in *Matter of Providence Journal*, 820 F.2d 1324 (1st Cir. 1986) (mod. 820 F.2d 1354 (1st Cir. *en banc* 1987) *cert. dismissed* 485 U.S. 693, 108 S.Ct. 1502 (1988)).

Petitioner not only raised its constitutional claims at the earliest opportunity, it persisted in those constitutional claims and made good faith attempts at appellate advocacy on the merits and in seeking stays from the effect of the injunctive orders. At the Illinois Appellate Court level, the Illinois Supreme Court level, and on two occasions before this court, the Petitioner sought stays to ameliorate the chilling effect of the injunctive orders,

arguing that they imposed an invalid system of prior restraint against the operation of its bookstore.

All previous attempts at seeking stays were unsuccessful, but no one can contest the good faith efforts set forth to adhere to and respect the court orders entered against it under the arguable jurisdiction of the circuit court. What Petitioner was contesting throughout this process was that the Circuit Court of Kendall County lacked subject matter jurisdiction in this litigation and that, as a result; any order which sought to impose an injunction, amounted to a prior restraint that was invalid, and was void *ab initio*. Petitioner certainly had the right to rely on the existing precedent from this court that demonstrated that the statute was unconstitutional and that order issued on the statute was patently frivolous and transparently invalid. In addition to the precedent set by this court, the Petitioner also relied on the Illinois court's holding in *Sequoia Books I* and *Sequoia Books III* which determined that the statute was unconstitutional.

The only alternative available to Petitioner was to close its doors and exercise self-censorship which would have represented a total abandonment of its First Amendment rights. Certainly a litigant may respectfully contest issues of constitutional magnitude without surrendering the constitutional rights which form the core of that litigation. The court has recognized that principle in the setting of the Fifth Amendment in *Maness v. Myers*, 419 U.S. 449 (1975), and should do the same in the setting of the First Amendment.

Just recently, in *CNN v. Noriega*, 917 F.2d 1543 (11th Cir. 1990) *cert. denied*, ___ U.S. ___, 111 S.Ct. 451 (1990),

Justice Marshall recognized the importance of First Amendment review in his dissenting opinion, when he stated:

> In my view, this case is of extraordinary consequence for freedom of the press. Our precedents make unmistakenly clear that "[a]ny prior restraint of expression comes to this court bearing a 'heavy presumption' against its constitutional validity. And that the proponent of this drastic remedy 'carries a heavy burden of showing justification for [its] imposition.' " Citing, *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 558, 96 S.Ct. 2791, 2802, quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577 (1971). *CNN v. Noriega*, ___ U.S. ___, 111 S.Ct. 451 (1990) (Marshall, J., dissenting)

While Justice Marshall was referring to the suppression of a news broadcast, the same concern applies to a contempt order which directly effects expressive activity. This decision should alert this court that a dangerous pattern is evolving, one that appears to abandon the *Near* principle, which has for so long protected citizens from impermissible prior restraints.

The relinquishment of First Amendment rights by Petitioner in the face of the invalid court order in this case was harm of an irreparable nature which distinguished the present case from *Walker v. City of Birmingham*, 388 U.S. 307 (1967). This court should address the conflict of decisions which exists between the history of the Sequoia litigation represented by this case and decisions of this court and the First Circuit Court of Appeals. It is apparent that there is no constitutional consistency among state courts, federal courts, and this court on this

important First Amendment issue. Indeed, even the Illinois decisions are internally inconsistent. This court has never permitted nor ratified a prior restraint on speech, under the circumstances of this case. Because of the First Amendment principles involved, the federal court – state court conflict, when combined with the internally inconsistent state court decisions, enhances the significance of this case, suggesting the propriety of this Court's review.

In *United States v. Providence Journal Co.*, 485 U.S. 693, 108 S.Ct. 65 (1987), the court exercised certiorari jurisdiction to address the important issue in this case. After briefing an argument, and for reasons other than the merits, the court concluded certiorari had been improvidently granted, and dismissed the petition. *United States v. Providence Journal Co.*, 485 U.S. 693, 108 S.Ct. 1502 (1988). The time has come to revisit this important prior restraint issue, and invalidate the prior restraint that was imposed and affirmed by the courts below.

CONCLUSION

The Appellate Court order in this case conflicts with decisions of this court in *Near v. Minnesota*, 283 U.S. 697 (1931) and its related decisions, the decision of the First Circuit Court of Appeals in *Matter of Providence Journal*, 820 F.2d 1342 (1st Cir. 1986) (mod. 820 F.2d 1354 (1st Cir. *en banc* 1987) *cert. dismissed* 485 U.S. 693, 108 S.Ct. 1502 (1988)), and with Illinois state court decisions. Accordingly, this court should grant a writ of certiorari to review the judgment and the opinion of the Appellate Court of the State of Illinois, Second District. There is a recurring

fundamental tension between First Amendment principles against prior restraint and the collateral bar rule. Granting certiorari in this case will address and resolve that constitutional tension under the First and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

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EXHIBIT A

GENERAL
No. 2-87-1008

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SEQUOIA BOOKS, INC., Defendant-Appellant.	Appeal from the Circuit Court of Kendall County. No. 86-CH-3 Honorable Wilson D. Burnell, Judge, Presiding.

ORDER

(Filed March 30, 1990)

The defendant, Sequoia Books, Inc., appeals from a jury verdict returned in the circuit court of Kendall County finding it guilty of contempt of court for selling three magazines in violation of a prior injunctive order enjoining it from maintaining the public nuisance (of the premises of the Denmark Book Store) and further enjoining it from exhibiting, selling or offering for sale materials in violation of chapter 38, section 11-20 (the obscenity statute) of the Criminal Code of 1961 (the Code). Ill. Rev. Stat. 1987, ch. 38, par. 11-20.

The facts leading up to the instant offense are fully described in this court's opinions in *People v. Sequoia Books, Inc.* (1988), 165 Ill. App. 3d 143 (*Sequoia I*), and

People v. Sequoia Books, Inc. (1988), 172 Ill. App. 3d 627 (*Sequoia II*), and the Illinois Supreme Court's opinion in *People v. Sequoia Books, Inc.* (1989), 127 Ill. 2d 271 (*Sequoia III*). Briefly, a complaint for injunction under the authority of section 37-1 *et seq.* of the Code (the nuisance statute) (Ill. Rev. Stat. 1985, ch. 38, par. 37-1 *et seq.*) was filed by the Kendall County State's Attorney's office against Sequoia Books, Inc., the owner and operator of the Denmark Book Store, and the owners of the premises where the bookstore was located, Bruce and Cathy Reimenschneider. Sequoia is the only defendant involved in the instant appeal, however.

Sequoia's motion to dismiss the complaint for an injunction, premised on the unconstitutionality of the nuisance statute, was denied by the trial court. After evidentiary hearings, on January 21, 1987, the trial court entered its written injunctive order, noted above, which enjoined the defendants from maintaining the public nuisance and from exhibiting, selling or offering for sale materials in violation of the obscenity statute. The order further enjoined all of the defendants from using the business premises for a one-year period, but provided the building could be used upon the posting of a $5,000 bond and a condition that no violation of the offenses under section 37-1 of the nuisance statute would occur. Ill. Rev. Stat. 1985, ch. 38, par. 37-1.

Sequoia posted the required bond. It then appealed, and the court entered a stay pending appeal. The stay was lifted after the State filed a motion to revoke the bond and vacate the stay of the January 21, 1987, trial court injunction.

On May 26, 1987, a rule to show cause was filed charging Sequoia Books, Inc., and the Riemenschneiders with contempt of court on the basis of two magazines purchased by a Kendall County deputy on May 11, 1987, Leather Sleaze and Hard Leather. A jury trial was held to determine if the injunctive order had been violated, and Sequoia Books was found guilty of contempt and fined $10,000. Sequoia appealed and, during the pendency of the instant appeal, the trial court's judgment in that case was affirmed in *Sequoia II*, 172 Ill. App. 3d 627, *cert. denied*, (19 ___), ___ U.S. ___, ___ L. Ed. 2d ___, 109 S. Ct. 2447.

On July 17, 1987, a second petition for rule to show cause was filed by the Kendall County State's Attorney, and on July 22, a rule to show cause was issued by the trial court. It is this second contempt proceeding which is the subject of this appeal. Sequoia raised objections throughout the trial court proceedings after the filing of the petition and entry of the order charging that the statute underlying the entry of the injunctive order [the nuisance statute] was unconstitutional.

The matter was tried before a jury on September 23 and 24, 1987. At the trial, Wayne Millen, a Kendall County sheriff's deputy, testified that on July 7, 1987, he purchased two magazines, Leather Sleaze and Hard Leather, at the Denmark Book Store. The next day, July 8, he returned to the store and purchased a third magazine, Letters to Corporal. The magazines were admitted into evidence over Sequoia's objection.

Dr. Michael Chiappetta, a registered psychologist and certified social worker practicing in Elgin, Illinois, also

testified for the State. Dr . Chiappetta stated his opinion, based upon a reasonable degree of psychological certainty, that a reasonable person would find no serious scientific value in the magazines.

Alan Jiranek, a self-employed artist specializing in scrimshaw (the engraving of antler horns), testified on behalf of the State, giving his opinion that the materials at issue had no artistic value. One other witness, Jeanette Page, a junior high English teacher, stated her opinion that the material had no serious literary value.

The court took judicial notice of the injunction order entered by the court on January 21, 1987, and the order was admitted for that limited purpose. Over Sequoia's objections, the jury was given an excised copy of the injunctive order.

Sequoia presented no evidence, and it made a motion for a directed verdict asserting, *inter alia*, that the injunction order underlying the alleged contempt was unconstitutional as a prior restraint and that there was insufficient evidence of *scienter*. Those motions were denied. After closing arguments, the jury returned a verdict of guilty of contempt due to the sale of the magazines. On September 28, 1987, the court fined the defendant $20,000 plus costs. Sequoia's motion for a new trial based, *inter alia*, on the unconstitutionality of the nuisance statute was denied.

Sequoia now brings this appeal from the judgment of contempt, contending the nuisance statute is unconstitutional and, as such, the contempt judgment of the court – premised as it was upon violation of an injunction

entered pursuant to such unconstitutional statute – cannot stand. We allowed the State leave to cite as additional authority our opinion in *Sequoia II*, 172 Ill. App. 3d 627, which it contends is dispositive of the instant appeal. We agree.

In that case, Sequoia appealed the contempt judgment and $10,000 fine imposed by the trial court as noted above for Sequoia's first violation of the same injunction order underlying the instant cause by selling the two magazines, Leather Sleaze and Hard Leather, to a Kendall County deputy on May 11, 1987. We noted there our prior opinion in *Sequoia I*, 165 Ill. App. 3d 143, wherein we held section 37-1 *et seq.* of the Code unconstitutional in its application to adult books stores that sell sexually explicit materials and reversed the underlying injunction. In light of the reversal of the injunction, we considered in *Sequoia II* where violation of the injunction was grounds for a contempt judgment. We concluded for the reasons set forth therein that it was, and we affirmed the trial court's judgment of contempt. *Sequoia II*, 172 Ill. App. 3d 627.

Inasmuch as the instant contempt judgment was premised on the same underlying injunction which was reversed in *Sequoia I* and our decision in *Sequoia I* has been affirmed as modified by the Illinois Supreme Court in *Sequoia III*, 127 Ill. 2d 271, we conclude our decision in *Sequoia II*, 172 Ill. App. 3d 627, is dispositive of the present appeal.

Accordingly, the judgment of the circuit court of Kendall County is affirmed.

Affirmed.

UNVERZAGT, P.J., with REINHARD and DUNN, JJ., concurring.

EXHIBIT B

SEAL

STATE OF ILLINOIS APPELLATE
COURT SECOND DISTRICT

APPELLATE COURT BUILDING
ELGIN, ILLINOIS
60120-5560

OFFICE OF THE CLERK
312/608-3780

Appeal from the Circuit Court of County of Kendall

Trial Court Number: 86CH3

THE COURT HAS THIS DAY, 05/22/90, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-87-1008

People v. Sequoia Books, Inc./
Riemenschneider,B.&C.

Petition by appellant for rehearing is denied.

(Unverzagt, Dunn, Reinhard, JJJ.)

LOREN J. STROTZ, Clerk

cc: Reno, O'Byrne & Kepley, P.C.
Michael J. Zopf
Beckett & Crewell
J. Steven Beckett
Thomas G. Jackson
Honorable Dallas C. Ingemunson
William L. Browers, Deputy Director
Marshall Stevens

EXHIBIT C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 3, 1990

Mr. J. Steven Beckett
Beckett & Crewell
313 N. Mattis Ave., S#209
Champaign, IL 61821

No. 70402 – People State of Illinois, respondent, v. Sequoia Books, Inc., petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 25, 1990.

EXHIBIT D

No. 70402

IN THE

SUPREME COURT OF ILLINOIS

People State of Illinois, Respondent	)	Leave to appeal
	)	Appellate Court
v.	)	Second District
	)	2-87-1008
Sequoia Books, Inc., Petitioner	)	86CH3

ORDER

(Filed Oct. 29, 1990)

This matter has come for consideration upon the motion of Petitioner to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

EXHIBIT E

FIRST AMENDMENT
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT F

ARTICLE 37. PROPERTY FORFEITURE

Paragraph

Article 37 was added by Laws 1965, p. 403, eff. July 1, 1965.

37-1. Maintaining public nuisance

§ 37-1. Maintaining Public Nuisance.

§ 37-1. Maintaining Public Nuisance. Any building used in the commission of offenses prohibited by Section 9-1, 10-1, 10-2, 11-14, 11-15, 11-16, 11-17, 11-20, 11-20.1, 11-21, 11-22, 12-15.1, 16-1, 20-2, 23-1, 23(a)(1), 24-1(a)(7), 24-3, 28-1, 28-3, 31-5 or 39A-1 of the "Criminal Code of 1961", approved July 28, 1961, as heretofore and hereafter amended, or prohibited by the "Illinois Controlled Substances Act"[1], or the "Cannabis Control Act" enacted by the 77th General Assembly, as heretofore and hereafter amended,[2] or used in the commission of an inchoate offense relative to any of the aforesaid principal offenses is a public nuisance.

(b)[3] Sentence. A person convicted of knowingly maintaining such a public nuisance commits a Class A

misdemeanor. Each subsequent offense under this Section is a Class 4 felony.

Amended by P.A. 85-384, § 1, eff. Jan. 1, 1988.

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[1] Chapter 56½, ¶1100 et seq.

[2] Chapter 56½, ¶701 et seq.

[3] No "(a)" in enrolled bill.

37-2. Enforcement of lien upon public nuisance

§ 37-2. Enforcement of lien upon public nuisance. Any building, used in the commission of an offense specified in Section 37-1 of this Act with the intentional, knowing, reckless or negligent permission of the owner thereof, or the agent of the owner managing the building, shall, together with the underlying real estate, all fixtures and other property used to commit such an offense, be subject to a lien and may be sold to pay any unsatisfied judgment that may be recovered and any unsatisfied fine that may be levied under any Section of this Article and to pay to any person not maintaining the nuisance his damages as a consequence of the nuisance; provided, that the lien herein created shall not affect the rights of any purchaser, mortgagee, judgment creditor or other lien holder arising prior to the filing of a notice of such lien in the office of the recorder of the county in which the real estate subject to the lien is located, or in the office of the registrar of titles of such county if that real estate is registered under "An Act concerning land titles" approved May 1, 1987, as amended;[1] which notice shall definitely describe the real estate and property involved, the nature and extent of the lien claimed, and the facts

upon which the same is based. An action to enforce such lien may be commenced in any circuit court by the State's Attorney of the county of the nuisance or by the person suffering damages or both, except that a person seeking to recover damages must pursue his remedy within 6 months after the damages are sustained or his cause of action becomes thereafter exclusively enforceable by the State's Attorney of the county of the nuisance.

Amended by P.A. 83-358, § 38, eff. Sept. 14, 1983.

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[1] Chapter 30, ¶45 et seq.

37-3. Revocation of licenses, permits and certificates

§ 37-3. Revocation of Licenses, Permits and Certificates. All licenses, permits or certificates issued by the State of Illinois or any subdivision or political agency thereof authorizing the serving of food or liquor on any premises found to constitute a public nuisance as described in Section 37-1 shall be void and shall be revoked by the issuing authority; and no license, permit or certificate so revoked shall be reissued for such premises for a period of 60 days thereafter; nor shall any person convicted of knowingly maintaining such nuisance be reissued such license, permit or certificate for one year from his conviction. No license, permit or certificate shall be revoked pursuant to this Section without a full hearing conducted by the commission or agency which issued the license.

Added by Laws 1965, p. 403, eff. July 1, 1965.

37-4. Abatement of nuisance

§ 37-4. Abatement of nuisance. The Attorney General of this State or the State's Attorney of the county wherein the nuisance exists may commence an action to abate a public nuisance as described in Section 37-1 of this Act, in the name of the People of the State of Illinois, in the circuit court. Upon being satisfied by affidavits or other sworn evidence that an alleged public nuisance exists, the court may without notice or bond enter a temporary restraining order or preliminary injunction to enjoin any defendant from maintaining such nuisance and may enter an order restraining any defendant from removing or interfering with all property used in connection with the public nuisance. If during the proceedings and hearings upon the merits, which shall be in the manner of "An Act in relation to places used for the purpose of using, keeping or selling controlled substances or cannabis", approved July 5, 1957,[1] the existence of the nuisance is established, and it is found that such nuisance was maintained with the intentional, knowing, reckless or negligent permission of the owner or the agent of the owner managing the building, the court shall enter an order restraining all persons from maintaining or permitting such nuisance and from using the building for a period of one year thereafter, except that an owner, lessee or other occupant thereof may use such place of the owner shall give bond with sufficient security or surety approved by the court, in an amount between $1,000 and $5,000 inclusive, payable to the People of the State of Illinois, and including a condition that no offense specified in Section 37-1 of this Act shall be

committed at, in or upon the property described and a condition that the principal obligor and surety assume responsibility for any fine, costs or damages resulting from such an offense thereafter.

Amended by P.A. 83-342, § 3, eff. Sept. 14, 1983.

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[1] Chapter 100½, ¶14 et seq.

37-5. Enforcement by private persons

§ 37.5 Enforcement by Private Persons. A private person may, after 30 days and within 90 days of giving the Attorney General and the State's Attorney of the county of nuisance written notice by certified or registered mail of the fact that a public nuisance as described in Section 37-1 of this Act, commence an action pursuant to Section 37-4 of this Act, provided that the Attorney General or the State's Attorney of the county of nuisance has not already commenced said action.

Added by Laws 1965, p. 403, eff. July 1, 1965.

EXHIBIT G

SEQUOIA SEQUENTIAL TIME OUTLINE

January 7, 1986

Kendall County State's Attorney filed a Complaint for an injunction directed against Sequoia Books, Inc. proscribing the sale or offer for sale of obscene material and the Riemenschneiders under Ill.Rev.Stat. Ch. 38, §37-1, *et seq.* (1985).

Sequoia responded by filing a motion to dismiss alleging that the statute was unconstitutional in that it imposed, an invalid prior restraint on future speech.

February 19, 1986

A hearing was held on the Complaint filed January 7, 1986. The Trial Court heard factual evidence concerning the ownership and operation of the Denmark II Bookstore.

March 12, 1986

The trial court issued a preliminary injunction against Sequoia Books, Inc., enjoining them from exhibiting, selling or offering for sale obscene materials.

March 14, 1986

The March 12, 1986, preliminary injunction order was reduced to writing and enjoined Sequoia from maintaining a public nuisance and expressly enjoined Sequoia from selling or offering for sale obscene materials.

March 27 & 28, 1986

Sequoia allegedly sold or offered for sale obscene magazines.

May 1, 1986

The Appellate Court dismissed Sequoia's attempted interlocutory appeal of the preliminary injunction order entered March 14, 1986.

May 9 & 29, 1986

Sequoia allegedly sold or offered for sale obscene magazines.

July 25, 1986

The Kendall County State's Attorney filed a petition for rule to show cause, alleging Sequoia violated the preliminary injunctive order by selling or offering for sale, obscene magazines on March 27 and 28, 1986, and May 9 and 29, 1986.

August 29, 1986

Sequoia filed written objections and contended that the preliminary injunction was unconstitutional and imposed an invalid prior restraint.

August 29, 1986

Hearing was held on the request for a permanent injunction.

January 7, 1987

The trial court orally pronounced its ruling that it would grant injunctive relief and order the Denmark II Bookstore closed. The Order enjoined Sequoia from maintaining a public nuisance at that location and expressly enjoined the exhibition, sale, or offer of sale of obscene materials from the premises. The order also enjoined both

Sequoia and Riemenschneiders from using the business premises for one year, provided that upon posting of a bond in the amount of $5,000 and further conditioned upon no violations of the offenses specified in Ill.Rev.Stat. Ch. 38, §37-1, the building could be used.

January 21, 1987

The Trial Court found that Sequoia had violated the preliminary injunctive order issued March 14, 1986 by selling and offering for sale, obscene magazines on May 9 and May 29, 1986.

Finding Sequoia in contempt, the trial court imposed a fine of $500.

Sequoia posted the $5,000 bond as directed by the written Order issued January 21, 1987.

January 21, 1987

Sequoia filed a notice of appeal seeking relief and reversal of the January 21, 1987 permanent injunction order.

January 21, 1987

While this appeal was pending, the State moved to revoke the bond and vacate any stay of enforcement of the January 21, 1987 Order.

The Appellate Court remanded the case for a factual hearing.

January 21, 1987

The Trial Court entered a written order of the ruling issued on January 7, 1987.

April 29, 1987

Factual hearing held to determine whether Sequoia had sold or offered for sale obscene magazines on March 4 & 5, 1987. Cause continued to May 4, 1987.

April 29, 1987

The Appellate Court remanded the issues for a factual hearing. Hearing continued to May 4, 1987.

May 4, 1987

Hearing held to determine whether Sequoia allegedly sold or offered for sale obscene magazines.

The trial court entered an order finding that Sequoia had violated the conditions of the bond issued January 21, 1987, by selling obscene magazines on March 4 and 5, 1987.

May 11, 1987

Over the objections of Sequoia, the Appellate Court entered an order revoking the appeal bond and dissolving the stay of the injunctive order.

Deputy Robert Wenman entered Denmark II Bookstore (Sequoia) and purchased the allegedly obscene magazines, *"Leather Sleaze"* and *"Hard Leather,"* from Sequoia.

May 26, 1987

A petition for rule to show cause was filed charging Sequoia with contempt of court on the basis that, on May 11, 1987, Sherriff's Deputy, Robert Wenman, entered the premises and purchased obscene magazines.

May 29, 1987

The Illinois Supreme Court denied Sequoia's request for a supervisory order to impose a stay.

June 15 & 16, 1987

A jury trial was held. At the trial, Sherriff's Deputy, Robert Wenman, testified that on May 11, 1987, he entered the Denmark II Bookstore and purchased two magazines, *"Leather Sleaze"* and *"Hard Leather"*. The magazines were admitted into evidence and shown to the jury over Sequoia's objections concerning the constitutionality of the Court's underlying injunctive order. The jury returned a verdict of guilty of contempt. The court summarily fined Sequoia $10,000 plus costs.

The Defendant's filed a motion for a new trial and again asserted the unconstitutionality of Ill.Rev.Stat. Ch. 38, §37-1, *et seq.* (1985).

The Motion for a new trial was denied.

Sequoia filed notice of appeal requesting a reversal of the contempt citation and $10,000 fine.

July 17, 1987

A petition for rule to show cause was filed charging Sequoia with contempt based upon Sherriff's Deputy Wayne Millen's purchase of allegedly obscene magazines on July 7 & 8, 1987.

September 23 & 24, 1987

A jury trial was held. At the trial, Sherriff's Deputy Wayne Millen testified that on July 7, 1987, he entered the Denmark II Bookstore and purchased two magazines,

"Leather Sleaze" and *"Hard Leather"*. The following day, July 8, 1987, Sheriff's Deputy Millen returned to the bookstore and purchased a third magazine, *"Letters to Corporal"*. The magazines were shown to the jury and admitted into evidence over Sequoia's continued objections. Based upon the sale of the three magazines, the jury found Sequoia in contempt.

September 28, 1987

The Trial Court fined the Defendants $20,000 plus costs.

October 2, 1987

The State filed a petition to enforce the injunctive order. Sequoia filed a written response.

October 9, 1987

A hearing was held, at which time the trial court ordered the Denmark II Bookstore padlocked and all the enclosed materials seized.

October 21, 1987

Sequoia filed a notice of appeal requesting reversal of the contempt citation and the $20,000 fine issued September 28, 1987.

November 3, 1987

The 2nd District Appellate Court denied Sequoia's request to stay the closure issued October 9, 1987.

November 5, 1987

The Denmark II Bookstore was padlocked.

January 19, 1988

The Appellate Court in *People v. Sequoia Books, Inc.*, 165 Ill.App.3d 143, 518 N.E.2d 775 (1988) (*Sequoia I*), delivered its opinion regarding Sequoia's appeal of the injunctive order issued January 21, 1987 and the $500 fine imposed upon Sequoia pursuant to Ill.Rev.Stat. Ch. 38, §37-1, et seq. (1985).

Holding: The Court held that Ill.Rev.Stat. Ch. 38, §37-1, et seq. (1985) was unconstitutional in its application to adult bookstores that disseminate sexually explicit materials. The January 21, 1987 injunctive order was reversed and the $500 fine was vacated. Subsequent to this decision, the Kendall County State's Attorney agreed to unpadlock and open the building.

Later

The State petitioned for rehearing.

Later

The State's petition for rehearing was denied.

Later

The State petitioned for leave to appeal to the Illinois Supreme Court.

July 21, 1988

The 2nd District Appellate Court in *People v. Sequoia Books, Inc.*, 172 Ill.App.3d 627, 527 N.E.2d 50, (1988) (*Sequoia II*), *cert. denied*, ___ U.S. ___, 109 S.Ct. 2447 (1989), delivered its opinion regarding Sequoia's appeal from the Contempt Citation and $10,000 fine issued June 16, 1987.

Holding: The Court held that the portion of the injunction order entered by the Circuit Court of Kendall County, which prohibited the sale or offer for sale of obscene material was invalid because obscenity is not within the area of constitutionally protected speech. The Appellate Court affirmed the Circuit Court's decision.

Later

Sequoia filed its petition for rehearing.

August 29, 1988

Sequoia's petition for rehearing was denied.

December 8, 1988

Sequoia's petition for leave to appeal to the Supreme Court of Illinois from *Sequoia II*, which upheld the $10,000 fine, was denied. *People v. Sequoia*, 123 Ill.App.3d 565, 535 N.E.2d 408 (1988).

Sequoia petitioned for writ of certiorari to the Supreme Court of the United States.

January 3, 1989

The Illinois Supreme Court stayed the mandate pending a petition for writ of certiorari to the United States Supreme Court.

March 22, 1989

The Illinois Supreme Court in *People v. Sequoia Books, Inc.*, 127 Ill.2d 271, 537 N.E.2d 302 (1989) (*Sequoia III*), *cert. denied*, ___ U.S. ___, 110 S.Ct. 835 (1990), delivered its opinion regarding the State's appeal from *Sequoia I* (which held Ill.Rev.Stat. Ch. 38, §37-1, et seq. (1985) was unconstitutional and reversed the underlying injunction.)

Holding: The one year closure and bond provisions of Ill.Rev.Stat. Ch.38, §37-4 (1985) which were applied in this case, are declared unconstitutional as applied to properties which have been adjudicated to be nuisances solely on account of their use in the commission of the offense of obscenity, under Ill.Rev.Stat., Ch. 38, §11-20, *et seq.* (1985).

The Illinois Supreme Court affirmed the judgment of the Appellate Court as modified; judgment of the Circuit Court was reversed.

June 5, 1989

The U.S. Supreme Court denied Sequoia's petition for writ of certiorari from the *Sequoia II* decision. *People v. Sequoia Books, Inc.*, ___ U.S. ___, 109 S.Ct. 2447 (1989).

January 16, 1990

The U.S. Supreme Court denied the State's petition for writ of certiorari from *Sequoia III* upholding *Sequoia I's* reversal of the $500 fine and closure order. *People v. Sequoia Books, Inc.*, ___ U.S. ___, 110 S.Ct. 835 (1990).

March 30, 1990

The 2nd District Appellate Court in *People v. Sequoia Books, Inc.*, General No. 2-87-1008 (1990) (*Sequoia Books IV*), delivered its opinion regarding Sequoia's appeal from the September 28, 1987 contempt citation and $20,000 fine levied against it.

Holding: "Inasmuch as the instant contempt judgment was premised on the same underlying injunction which was reversed in Sequoia I and our decision in Sequoia I was affirmed as modified by the Illinois

Supreme Court in Sequoia III, we conclude our decision in Sequoia II is dispositive of the present appeal."

April 20, 1990

Sequoia filed its petition for rehearing.

May 22, 1990

Sequoia's petition for rehearing was denied.

June 21, 1990

Sequoia filed a petition for leave to appeal to the Supreme Court of Illinois.

October 3, 1990

The Illinois Supreme Court denied Sequoia's petition for leave to appeal. *People v. Sequoia Books, Inc.*, 133 Ill.2d 568, 561 N.E.2d 703 (1990).

October 17, 1990

Sequoia filed a motion to stay the mandate.

October 29, 1990

Sequoia's motion to stay the mandate of the Illinois Supreme Court pending its appeal for certiorari in the United State's Supreme Court was granted.

No. 90-1066

In The

Supreme Court of the United States

October Term, 1990

SEQUOIA BOOKS, INC.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

ROLAND W. BURRIS
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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the Illinois Appellate Court properly apply constitutional law? For instance, did it follow the dictates of this Court in applying the "collateral bar" principle enunciated in *Walker v. City of Birmingham*? Is its decision consistent with decisions from the Courts of Appeal which have applied the "collateral bar" principle?

2. Did the Illinois Appellate Court apply sound constitutional reasoning? For instance, is the court's application of the "collateral bar" principle in this cause consistent with its prior decision which declared the Illinois public nuisance act unconstitutional?

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No. 90-1066

In The

Supreme Court of the United States

October Term, 1990

SEQUOIA BOOKS, INC.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The State of Illinois asks this Court to deny the Petition for Writ of Certiorari to review the judgment and order of the Appellate Court of Illinois, Second District, entered March 30, 1990, insofar as the petitioner does not raise an issue worthy of review.

OPINION BELOW

The opinion below is cited as *People v. Sequoia Books, Inc.*, No. 2-87-1008 (2nd Dist. March 30, 1990)

(unpublished opinion pursuant to Rule 23). A copy of the opinion is included in petitioner's appendix.

STATEMENT OF THE CASE

Petitioner Sequoia Books seeks, for the second time, review of an order finding it in contempt for violation of a court order. Review again involves the inter-relationship between two separate legal actions: one for injunctive relief and the one for contempt.

A) Procedural Background

The Injunction Action

The State of Illinois initiated an action for injunctive relief, pursuant to the Illinois Public Nuisance Act, alleging that Sequoia Books was using a building in the commission of the offense of obscenity so as to create a public nuisance. An Illinois judge agreed and issued an injunction against Sequoia Books on January 21, 1987. The injunction provided the following:

> 1. That this Court hereby enjoins the defendant, Sequoia Books, Inc., its agents, employees and assigns, from maintaining the public nuisance as described in the findings hereinabove and further expressly enjoins the defendant, Sequoia Books, Inc., its agents, employees and assigns from exhibiting, selling or offering for sale materials in the premises described above in violation of Chapter 38, § 11-20 Illinois Revised Statutes.
>
> 2. That the defendants, Sequoia Books, Inc., Bruce and Cathy Riemenschneider are restrained from maintaining or permitting such

> nuisance and from using the building described hereinafter for a period of one (1) year hereafter providing that upon the defendants giving Bond to the Clerk of this Court to be approved by this Court in an amount of $5000.00 payable to the State of Illinois and including a condition that no offense specified in § 37-1 of Chapter 38, Illinois Revised Statutes, shall be committed, at, in or upon the property described and that the principal obligor and surety assume responsibility for any fine, costs or damages resulting from any such offense hereafter that then and upon the filing of said Bond the defendants may use the building as described.

Sequoia Books filed a notice of appeal. It also posted bond, but the bond was revoked by the court on May 11, 1987, upon a finding that Sequoia Books violated the condition of the bond by selling obscene magazines on the premises on March 4, and 5, 1987.

The First Contempt Action

While the appeal in the injunction action was pending, the State of Illinois charged Sequoia Books with contempt of court on the basis that it sold obscene magazines on May 11, 1987 after bond was revoked and the injunction was in full force. The contempt action was the subject of a two day jury trial, June 15-16, 1987. After the State presented evidence that the magazines were obscene, Sequoia Books moved for a directed verdict asserting that the order underlying the alleged contempt was unconstitutional as a prior restraint. This was denied.

Sequoia Books presented no evidence and argued only that the State failed to prove a wilful violation. The

jury returned a verdict of guilty of contempt and, on June 16, 1987, the court fined Sequoia Books $10,000 plus costs. Sequoia Books filed a notice of appeal.

The Injunction Appeal

Six months later, January, 1988, the Illinois Appellate Court issued its opinion in the injunction appeal. In *People v. Sequoia Books, Inc.*, 165 Ill. App. 3d 143, 518 N.E.2d 775 (2nd Dist. 1988) (*Sequoia I*), it declared that the obscenity provisions of the Illinois Public Nuisance Act were unconstitutional as a prior restraint.

The First Contempt Appeal

In July of 1988, the Illinois Appellate Court issued its opinion, affirming the conviction for contempt. *People v. Sequoia Books*, 172 Ill. App. 3d 627, 527 N.E.2d 50 (2d Dist. 1988) (*Sequoia II*). In its opinion, the appellate court applied the "collateral bar" rule of *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1964). The *Walker* rule provides that, generally, a contempt finding must stand even when it is based on an unconstitutional order of injunction. But *Walker* provides two exceptions when a contemnor may challenge the legality of the underlying order: where 1) the court lacked jurisdiction to enter the order or 2) the order is "transparently invalid."

The Appellate Court held that neither exception applied in this contempt action. The Appellate Court had, in the past, applied the exception for transparently invalid orders where the order had imposed a prior

restraint. *See Cooper v. Rockford Newspaper, Inc.*, 50 Ill. App. 3d 250, 365 N.E.2d 746 (1977) (order invalid as enjoining free speech); *see also Matter of Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986) (order transparently invalid because it enjoined free speech).

But the order in this case did not enjoin free speech. The injunction order consisted of two separate paragraphs. Paragraph one enjoined Sequoia Books from distributing obscenity. This did not create an impermissible prior restraint because obscenity is not within the area of constitutionally protected speech. Prior restraints against obscene publications are constitutionally valid. Sequoia Books could not be subject to contempt for the sale of nonobscene material. After all, the contempt finding in this cause issued only because the jury found that the magazines sold by Sequoia Books were obscene. Therefore, paragraph one was not a transparently invalid order.

The Appellate Court explained that this decision did not conflict with its earlier decision in the injunction action. The earlier decision declaring the public nuisance act unconstitutional was based on paragraph two of the injunction. Only paragraph two was concerned with enjoining use of the building. This paragraph created a prior restraint on free speech since it prevented use of the building for one year even for the future sale of nonobscene materials. Paragraph one, however, neither enjoined the use of the building nor the dissemination of free speech. The appellate court held that it was a constitutionally valid order, and Sequoia Books was collaterally barred from challenging it by way of an attack on the contempt conviction. Petitioner's request for rehearing

was denied, as was its petition for leave to appeal to the Illinois Supreme Court. The petitioner then sought a writ of certiorari from this Court, which was denied on June 5, 1989. *People v. Sequoia Books, Inc.*, 490 U.S. 1097, 109 S.Ct. 247 (1989).

REASONS FOR DENYING THE WRIT

THE ILLINOIS APPELLATE COURT PROPERLY FOLLOWED CONSTITUTIONAL PRINCIPLES IN APPLYING THE 'COLLATERAL BAR' PRINCIPLE AND DID NOT CREATE A CONFLICT WITH ONE OF ITS OWN PRIOR DECISIONS.

Petitioner alleges that the Illinois Appellate Court incorrectly applied the "collateral bar" rule enunciated in *Walker v. City of Birmingham*, resulting in a conflict with decisions of this Court and the First Circuit. Petitioner is mistaken. As petitioner candidly concedes, this exact issue was previously presented to this Court in its petition for Certiorari stemming from the *Sequoia II* decision. Petition at 11. In his subsequent citation to that case, petitioner acknowledges that certiorari was denied. *Id.* Since the instant petition challenges a decision that adopts the *Sequoia II* reasoning in its entirety, the Court should again decline review, as petitioner has advanced no new reason why this Court should grant the petition.

As the appellate court's opinion in the instant case consisted solely of its finding that the *Sequoia II* opinion covered the instant situation as well, this brief in opposition must, by necessity, focus on that opinion.

Petitioner argues that the Illinois Appellate Court has "rubber stamped" its opinion in *Sequoia II*. Respondent

maintains that the appellate court properly applied the well-settled doctrine of *stare decisis* by following the precedent established in *Sequoia II*, and since the earlier case was correctly decided, this Court should deny the petition for a writ of certiorari.

The Illinois Appellate Court correctly applied the "collateral bar" rule that this Court defined in *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824 (1964). The *Walker* rule is that, when a party believes an injunction creates an unconstitutional prior restraint, he must still abide the injunction. *Walker*, 388 U.S. at 313-314, 87 S.Ct. at 1828; *Maness v. Meyers*, 419 U.S. 449, 458, 95 S.Ct. 584, 591, 42 L.Ed.2d 574 (1975). Any attempt to challenge the constitutionality of the injunction by way of a collateral action such as contempt is barred because the proper route for review is a direct appeal of the order of injunction. *Walker*, 388 U.S. at 314, 87 S.Ct. at 1828.

However, there are two exceptions when a party need not abide an injunction: 1) when the court lacked jurisdiction to enter the injunction or 2) when the injunction is "transparently invalid". *Walker*, 388 U.S. at 315, 97 S.Ct. at 1829; see *Matter of Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986). In these instances, the injunction is not protected by the collateral bar rule. The exceptions balance the need for respect for court orders with the right of the citizen to be free of a clearly improper exercise of judicial authority. See *Matter of Providence Journal Co.*, 820 F.2d at 1347.

The Appellate Court also correctly analyzed the decision by the First Circuit in *Matter of Providence Journal Co.*,

820 F.2d 1342 (1st Cir. 1986). There, a temporary injunction barred a party from establishing certain logs and memoranda. The party published the information despite the injunction and thereby challenged the validity of the order by way of a collateral action for contempt, alleging that the order created an unconstitutional prior restraint on pure speech.

The First Circuit found that review was not collaterally barred under the *Walker* test because the order was transparently invalid. Several factors made the invalidity of the injunction manifestly transparent: 1) the order constituted a prior restraint suppressing free speech which created a virtually insurmountable presumption of unconstitutionality; 2) the trial court had, before issuing the order, failed to make findings necessary to support a prior restraint, namely that publication would result in damage to a near sacred right, that the prior restraint would be effective, and that less extreme measures were not available and 3) the prior restraint issued in the absence of a full and fair hearing with all the attendant procedural protections. *Providence Journal*, 820 F.2d at 1350-1351. Therefore, the collateral bar rule did not prevent review.

The Illinois Appellate Court carefully considered *Walker* and *Providence Journal* and correctly determined that, in this case, review of the validity of the injunction was barred. Here, there was simply no prior restraint that was the cause for concern in *Providence Journal*. Paragraph one of the injunction enjoined the sale of obscene material. It did not suppress the right of Sequoia Books to sell nonobscene material. This provision of the injunction was not transparently invalid.

This Court must agree that, since paragraph one did not amount to a prior restraint, the provision is consistent with all relevant constitutional authority. There is no merit to the claim that the decision conflicts with *Walker* and *Providence Journal*. Sequoia Books is collaterally barred from challenging the validity of that provision by way of a contempt citation. Nor is there any merit to the claim that the Appellate Court's decision conflicts with its own prior opinion, which arose on the same injunction, declaring the public nuisance act unconstitutional. In that previous opinion, the court made clear that only paragraph two of the injunction was based on the public nuisance act provision which permitted the court to enjoin use of the building for one year. Such an order was necessarily invalid as a prior restraint on free speech because it prevented the future selling of even non-obscene material. This paragraph required the striking of the public nuisance act. Paragraph one, which did not authorize shutting down the building, had nothing to do with the decision on that previous cause. *People v. Sequoia Books*, 165 Ill. App. 3d 143, 518 N.E.2d 775 (2nd Dist. 1988).

The difference between paragraphs one and two also negates petitioner's suggestion that, because the public nuisance act was unconstitutional, the court lacked jurisdiction to enter the injunction. The trial court certainly had jurisdiction to enjoin petitioner, as it did in paragraph one, from disseminating obscene materials since, in Illinois, obscenity is a criminal offense. This proscription did not arise out of the public nuisance act; hence, the unconstitutionality of the act had no affect on the court's jurisdiction to enter that order.

Finally, the issue in this case is not the same issue this Court sought to review in the *Providence Journal* case. This Court granted certiorari review in the *Providence Journal* case, only to dismiss the writ of certiorari as improvidently granted on a finding of lack of jurisdiction to hear that cause. *United States v. Providence Journal Co.*, 108 S.Ct. 1502 (1988). But that cause presented an issue different from this one. In *Providence Journal*, the record supported the conclusion that the contemnor violated an order that was invalid as a prior restraint. Thus, it was necessary to compare and weigh two very important and competing principles that arose in that cause – the need for respect of courts orders against the right to free speech.

But here, by contrast, the record supports the Appellate Court's conclusion that contemnor again violated an order that did not constitute a prior restraint. Thus, only one constitutional issue is involved, namely, the need for respect of court orders. There is no basis on which to weigh this principle against the right to free speech. Sequoia Books simply cannot show that paragraph one impinged any freedom of speech.

Petitioner's reliance on *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), is similarly misplaced. Where adequate and effective remedies are available for orderly review of the challenged ruling, *Dickinson* would not permit an affected party to disregard an unconstitutional court order. *Id.*, 465 F.2d at 511. Petitioner implicitly concedes that such remedies exist. (Petition at 14, 15). Under the rationale of *Dickinson*, furthermore, the circuit court clearly enjoyed jurisdiction over the controversy and the

surrender of a constitutional right, if any, was not irretrievable. *Dickinson*, 465 F.2d at 511, 512. *Dickinson* is therefore distinguishable.

The Illinois Appellate Court properly vindicated the principle that all orders of courts be complied with promptly. There is no reason for this Court to intervene.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari in this cause.

Respectfully submitted,

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